

Exhibit A

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 SUSANNA MIRKIN, ET AL.,)
4 Plaintiff,) 1:18-cv-02949-ARR-RER
5 vs.) Brooklyn, NY
6 XOOM ENERGY, LLC, ET AL.,) February 3, 2022
7 Defendant.)

8 TRANSCRIPT OF TELEPHONE CONFERENCE
9 BEFORE THE HONORABLE RAMON E. REYES, JR
10 UNITED STATES MAGISTRATE JUDGE

11 APPEARANCES (All present by video or telephone):

12 For the Plaintiff: STEVEN DANA COHEN, ESQ.
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17 For the Defendant: DIANE S. WIZIG, ESQ.
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1 THE COURT: Good morning. This is Magistrate Judge
2 Reyes. We're holding a telephone conference in the case of
3 Mirkin v. XOOM, docket number 18-cv-2949.

4 Counsel for the plaintiffs, please state your name for
5 the record.

6 MR. STEVEN COHEN: Steven Cohen for plaintiffs,
7 Wittels McInturff Palikovic. Thank you, Your Honor.

8 MR. STEVEN WITTELS: Good morning, Your Honor. Steven
9 Wittels as well for the plaintiffs and the proposed class.

10 THE COURT: Counsel for the defendants?

11 MS. DIANE WIZIG: Good morning, Your Honor. This is
12 Diane Wizig of McDowell Hetherington on behalf of the
13 defendants. My colleague Matt Matthews is held up on another
14 hearing and will join us as soon as he can. So we can go
15 forward.

16 THE COURT: Okay. So I see that plaintiffs filed a
17 motion to compel and there was an opposition to that. Putting
18 that issue aside, why don't you give me an update on what's
19 going on in the case, Mr. Cohen.

20 MR. COHEN: Well, the parties have held meet and
21 confers, and we're getting closer to starting depositions. I
22 think in the most recent meet and confer there might be another
23 like a privilege-related issue that you might have to queue up
24 for the Court in the coming weeks. So we'll go ahead and right
25 to the Court on that issue.



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1 But otherwise things are moving along with regard to
2 discovery. Defendants, I believe, have completed their
3 production, although they do owe us a supplemental privilege
4 log, which I believe they said is coming next week. And yeah,
5 that's pretty much where things stand.

6 THE COURT: Okay. I'm looking at the docket sheet to
7 pull up the most recent case management plan. There we go.
8 All right. So you have currently the fact witness depositions
9 to be completed by March 28th. Then your expert disclosures to
10 follow April 1, May 2. Depositions of experts May 17th.

11 So this current dispute on the document production
12 with respect to these other folks and this privilege issue are
13 the only outstanding paper discovery issues that need to be
14 resolved prior to you rolling into your depositions, yes?

15 MR. COHEN: Yes. That's correct.

16 THE COURT: Okay. And I guess the dates for the
17 depositions and the expert disclosures may have to be moved
18 depending upon whether I grant the motion to compel. Because
19 it --

20 MR. COHEN: Right.

21 THE COURT: -- would probably take a little bit of
22 time for the defendants to produce those records.

23 MR. COHEN: That's correct, Your Honor.

24 THE COURT: And this privilege issue, just preview it
25 for me.



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1 MR. COHEN: Basically, for the most part, is there're
2 documents that we believe that defendants are over withholding
3 where certainly there are a number of documents in their logs
4 where they're -- it's like an email with an attachment. And
5 based on the description that we're being provided, we feel
6 that it's very likely that the attachment itself doesn't have
7 any legal advice, and that they basically could be producing
8 these documents with redactions or in part, at the very least.

9 Although it's possible, maybe some of these documents
10 shouldn't be considered privileged at all. We've had meet and
11 confers with them and they have removed some documents from
12 their privileged logs, and that makes us suspicious that there
13 might be more that they're over withholding.

14 THE COURT: How many documents are we talking about?

15 MR. COHEN: About a dozen.

16 THE COURT: Okay, good. All right. I'm not a big fan
17 of in-camera reviews, so with 12 documents, as long as we're
18 not each 1,000 pages, I wouldn't have a problem with that. But
19 that's not my first preference.

20 So let's talk about this motion to compel. And Mr.
21 Cohen can take the lead on this. But the one question I have
22 is these other customers who became variable rate customers
23 during the class period, however they became variable rate
24 customers, were their variable rates calculated any differently
25 than the Mirkins?



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1 MR. COHEN: The answer to that, Your Honor, is no.
2 That they were calculated exactly the same way as the Mirkins'
3 variable rates. The variable rates are consistent in the XOOM
4 plan.

5 THE COURT: Ms. Wizig, is that correct?

6 MS. WIZIG: Mr. Cohen is correct that XOOM sets its
7 variable rates for its New York customers the same in the sense
8 that the rate for each utility load zone is the same no matter
9 whether the customer began as fixed rate or variable rate. If
10 they are being charged a variable rate, there is one rate that
11 is charged in that load zone.

12 THE COURT: So if the class definition is all
13 customers who were charged a variable rate during the class
14 period, not exactly how it's worded, but that's if the class
15 definition, why does it matter how they became a variable rate
16 customer? If once they were a variable rate customer, they're
17 being treated exactly as the Mirkins were, why does it matter
18 how they became a variable rate customer?

19 MS. WIZIG: Sure. So it's our position that it
20 matters the way they became a variable rate customer because
21 from the very fact that plaintiffs are looking for production
22 of exemplar contracts for those customers, that they received
23 different contracts.

24 The other reason we believe that they're differently
25 situated and aren't properly within the class definition is



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1 because customers who enroll on a fixed rate or who enrolled
2 with a legacy company like Planet Energy would have different
3 expectations about their variable rates than a customer who
4 chose the variable rate from the outset. And that's why we
5 reference the various other cases in which this has been an
6 issue and in which the original complaint, like the Mirkins'
7 complaint, contained a broad class definition. But where those
8 plaintiffs quickly realized and conceded that the plaintiffs
9 how they enrolled -- or sorry class members, whether they
10 enrolled on a fixed rate at the outset or a variable rate at
11 the outset made a meaningful difference and limited either
12 their proposed class definition at cross certification or
13 settlement class. So this is a pretty common distinction in
14 the variable rate class action. And we believe that it's
15 inappropriate, that the breadth of the class definition in the
16 complaint is inappropriate.

17 THE COURT: These other cases where the plaintiffs
18 changed their class definition, at what point was that? And
19 did they seek the same type of discovery and get it only to
20 then change their class definition when they realized there was
21 a problem? Or did they not seek that discovery and claims
22 change their class definition on their own because they
23 realized there was a problem? What?

24 MS. WIZIG: Sure. It varies depending on the case.
25 So with respect to the Stanley case that plaintiffs cite in



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1 their letter and that we cite in the body of our opposition,
2 that class was partially limited at the outset. So the
3 complaint limited it with respect to the company that the
4 customer enrolled on. They were only seeking to represent
5 customers of a legacy company -- or sorry, two legacy companies
6 called NYSEG Solutions and Energetix at the outset.

7 And then in the course of discovery, they did seek
8 discovery regarding customers who enrolled both ways, so
9 customers who enrolled with that legacy company variable at the
10 outset and customers who enrolled with the legacy company fixed
11 at the outset. Based on that discovery, they limited their
12 settlement class to only customers like their named plaintiffs
13 who started fixed at the outset.

14 Similarly, with the Hamlin (ph.) case that was in the
15 Southern District of New York, that class started out with a
16 broad definition and that counsel and plaintiffs also pursued
17 broad discovery. They pursued discovery about both customers
18 who enrolled fixed and customers who enrolled variable. That
19 named plaintiff, Mr. Hamlin, was similarly situated to the
20 Mirkins. He enrolled variable and in the end limited his
21 settlement class to customers like him who enrolled variable.

22 The Bell (ph.) case was a little bit different. The
23 Bell case the original complaint was pleaded very broadly to
24 encompass all customers regardless of how they enrolled. But
25 their motion for class certification, so not their settlement



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1 motion, limited their class to customers just like Ms. Bell who
2 enrolled fixed and then went variable.

3 So it's a little bit all over the place, but both of
4 these pursued both types of discovery and then limited Ms. Bell
5 we objected on similar grounds here, just the inverse, and she
6 enrolled fixed and then went variable. We only produced
7 information about customers like her. And she acquiesced to
8 that definition in both discovery and her class certification
9 motion.

10 MR. WITTELS: Judge, may I jump in? This is Steven
11 Wittels.

12 THE COURT: Sure.

13 MR. WITTELS: Judge, I would argue to you that what
14 other plaintiffs did in other cases is irrelevant here because
15 A, we've got case law on the Second Circuit which says you
16 don't have to have the exact same case. I mean, Stanley's
17 quite clear quoting that the Second Circuit says you don't need
18 (Indiscernible), you don't have to have identical injuries as
19 long as you have the same general of character.

20 And what defense counsel just cited actually argues in
21 favor of the discovery we're requesting, because as she pointed
22 out, most of these other cases -- and I don't have the facts of
23 those cases at our fingertips and we don't have the record in
24 those cases, we're just relying what counsel is saying -- both
25 cases seem to start broad, which is what our case is, all



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1 variable rate customers.

2 And once you get to discovery, as long as you credit,
3 which we have, you're entitled to the discovery of the variable
4 rates for all the customers which we asked for and that they're
5 withholding. Once you get that discovery, if you decide to
6 settle your case and make a class settlement motion, you might
7 temper down or restrict some of the class if you don't think
8 you can certify it or if you negotiate that -- we don't know
9 the reasons in those cases why the plaintiff's counsel didn't
10 include more. Maybe that was a tradeoff in their negotiations.

11 But the point being is, are we entitled to the
12 discovery? Are they withholding legit discovery? And do they
13 have any case law to support? And we have none, no case law
14 from defendants saying that it's improper to get variable rate
15 contracts when someone flips from a fixed rate or it comes from
16 a different company. They've offered no authority that would
17 oppose our arguments. And they're absolutely improperly
18 withholding this data.

19 We need to know this because we need to see whether in
20 fact there's any difference in the contracts. We don't believe
21 there is, because as counsel just indicated, when they charge
22 variable rate customers they charge them under the same
23 process, whether they came originally variable or whether they
24 flipped from fixed. So we don't think there's any sound reason
25 why this discovery shouldn't be produced.



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1 THE COURT: I don't necessarily disagree with you, Mr.
2 Wittels. I was inquiring of those cases just to find out if
3 they are cases on point. And if I --

4 MR. WITTELS: Right.

5 THE COURT: -- it matters to me what the judges did in
6 those cases whether there was a motion to compel, whether the
7 discovery was produced without that. And so I just try to
8 figure it out.

9 MR. WITTELS: Right. I understand, Your Honor.

10 THE COURT: Look, I think -- what's the saying?
11 Devil's in the details, right? If in fact these other
12 potential class members once they became variable rate
13 customers were subject to the same treatment as the Mirkins
14 were, then they are similarly situated and are truly potential
15 class members.

16 I don't know that it's relevant how they became
17 members of the class coming from a fixed rate plan, coming from
18 another provider, supplier. So I'm not going to limit the
19 discovery at this point.

20 So you're going to have to produce these documents and
21 data. The question is how long do you need to do that and how
22 does it impact the schedule. That's something you need to
23 think about and need to confer on?

24 MS. WIZIG: Yes, Your Honor. If you would allow us a
25 few days to talk to our clients and confer with plaintiffs on



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1 how long it will take to gather those exemplar contracts and
2 the customer data, produce it, and then potentially need to
3 move out some of these dates accordingly, we would appreciate
4 that.

5 THE COURT: Okay. Why don't you do that, confer with
6 Mr. Cohen and Mr. Wittels, propose a revised schedule, and get
7 that to me by the end of next week, that work? To the 11th, I
8 guess?

9 MR. COHEN: Yeah, that works for plaintiffs.

10 THE COURT: Okay. That's what we'll do, then. The
11 privilege issue, will resolution of that impact the schedule in
12 any meaningful way?

13 MR. COHEN: Probably not, Your Honor. I don't think
14 those documents would necessarily need to hold things up.

15 THE COURT: Okay. All right. So key that up when you
16 will. I won't press you on that. Hopefully you can work it
17 out. If not, send me motion whenever you ever want.

18 And I will look at the schedule that you submit. And
19 why don't you -- well, no. I was going to say why don't you
20 put a date for another conference in that schedule. But I'd
21 rather see the schedule and then pick a date myself. And we'll
22 put that on the docket and you'll see it.

23 MR. COHEN: So should we leave that line for you to
24 fill in, basically?

25 THE COURT: Yeah. I don't know if I'll fill it in or



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1 you'll just see -- on ECF you'll see the date appear when I
2 approve the schedule. But yeah, leave it blank.

3 MR. COHEN: Okay. Thank you, Your Honor.

4 THE COURT: All right. Okay.

5 Anything else we need to discuss?

6 MR. COHEN: Not from plaintiffs, Your Honor.

7 MS. WIZIG: Not from defendants either, Your Honor.

8 Thank you.

9 THE COURT: Okay.

10 Thank you, everyone. Take care.

11 MR. COHEN: Thank you.

12 MR. WITTELS: Thank you, Your Honor.

13 (Proceedings concluded.)

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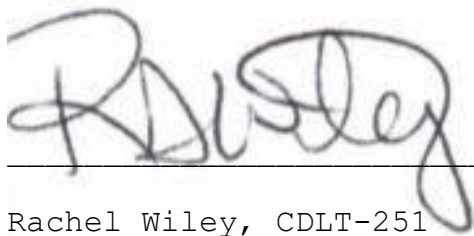
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C E R T I F I C A T I O N

I, Rachel Wiley, court-approved transcriber, do hereby
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Rachel Wiley, CDLT-251

February 7, 2022

DATE

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